Wong Ing Tong v Yap Piat Eng @ Yap Lien Eng & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(NCVC)(W)-104–02 OF 2020, W-01(NCVC)(W)-144–03 OF 2020 AND W-01(NCVC)(W)-145–03 OF 2020
HAS ZANAH MEHAT, HADHARIAH SYED ISMAIL AND MOHD SOFIAN JJCA
18 FEBRUARY 2022

Land Law — Title — Indefeasibility of title — Fraudulent transfer of lands — Bona fide purchaser — Whether the titles were defeasible — Whether the transfer of the properties to the second defendant were obtained by forgery — Whether the fraud was proved — Whether the damages were appropriate — Whether the bank was bona fide purchaser — National Land Code s 340

These three appeals were from the decision of the High Court which allowed the plaintiffs claim for the loss of rental of two properties and set aside the transfer and registration of the second defendant's name as the registered proprietor of the properties; cancelled the charges in favour of the sixth defendant and awarded damages to the plaintiffs. Sometime in March 2014, the first plaintiff appointed a lawyer, YKS to transfer her husband's half share in the first property to her name. For that purpose, she handed the issue document of title for the first property to YKS. She claimed the issue document of title for the first property was returned to her by the first defendant. On 20 September 2016, the first plaintiff was informed by her tenants that they were disturbed by the second defendant and for his agent who claimed that the tenants had to make payments of rental to the second defendant directly or the tenants would have to vacate the properties on the basis the second defendant was the owner of the properties. The tenants also received a notice of demand from the second defendant's lawyer. The plaintiffs instructed their solicitors to conduct private land searches on the properties and discovered about the transfer of the properties to the second defendant as well as the documents purportedly executed between the second defendant in relation to the sale and transfer of the properties to the second defendant. The plaintiffs commenced an action against the defendants to restore the properties back to the plaintiffs and for damages for the losses they had suffered. The plaintiffs alleged that the transfers and the charges could not had been affected without the fraudulent conduct involving the defendants. In addition to fraud, the plaintiffs also alleged negligence against the third defendant and breach of statutory duty against the fifth defendant. Dissatisfied with the High Court's decision in allowing the plaintiffs claim, the plaintiff's, the second defendant and the sixth defendant appealed to the Court of Appeal. The issues before this court were:

(a) whether the titles were defeasible; (b) whether the transfer of the properties to the second defendant were obtained by forgery; (c) whether the fraud was proved; (d) whether the damages were appropriate; and (e) whether the bank was a bona fide purchaser.

Held, dismissing the three appeals with costs:

(1) The court agreed with learned counsel for the plaintiffs' submission that the learned HCJ's finding of forgery was a finding of fact which was supported by the evidence of the witnesses. Both the plaintiffs' witnesses had testified that they had not seen nor signed the disputed documents. The plaintiffs' evidence on forgery was supported by the evidence of the plaintiffs' handwriting expert, PW6 who testified that the plaintiffs' purported signature on the disputed documents were from different authorship. The court agreed with the plaintiffs' contention that the plaintiffs' pleaded case was not limited to fraud only. Our courts had recognised that s 340(2)(b) of the National Land Code ('the NLC') was a specific provision which expressly stated forgery by itself sufficed in making a registered title defeasible even though the proprietor or the transferee was not a party to the forgery. It affected the immediate purchaser even if he was an innocent purchaser for value. In the circumstances of this case, the learned HCJ had not erred in law or in fact in his finding of forgery and in invoking s 340(2)(b) of the NLC (see paras 25–27 & 33–34).

(2) As the true owners of the properties prior to this case, surely the plaintiffs had in their possession the original titles. With the High Court's finding that the plaintiffs did not sell the properties, it was only logical to say that the plaintiffs remained the true owners of the properties. Therefore, even assuming it was true that the second defendant had a genuine title, it did not change the fact that the transfer of the properties never took place. The law in s 340(2)(b) of the NLC did not operate in favour of the second defendant. It was without doubt that the second defendant was an immediate purchaser of a title tainted with forgery and acquired a title that was not indefeasible under s 340(2)(b). The bona fide of the immediate purchaser was not a shield of indefeasibility. Therefore, the learned HCJ did not err in holding that the second defendant's titles were defeasible (see paras 37–38).

(3) The plaintiffs did not know and had no dealing with the second to the fifth defendant. It would be impossible for the plaintiffs to adduce evidence to prove fraud against the second to the fifth defendant. The plaintiffs could only testify on the impugned documents, namely, their signatures were forged. As for the negligence alleged against the third defendant, although the learned HCJ found that the third defendant was reckless, no duty of care was owed to the plaintiffs as there was no

solicitor-client relationship between the third defendant and the plaintiffs. The court found no good reason to disturb the finding of fact made by the learned HCJ (see para 48).

(4) In the absence of any explanation by the learned HCJ as to why the HCJ only allowed the sums of RM288,000 and RM161,000 for the respective property, the court was not in in a position to say the award was erroneous. On the plaintiff's claim for exemplary damages, the court agreed with the learned HCJ that this was not a suitable case to award exemplary damages as there was no clear evidence as to whose conduct amongst the defendants could be calculated to make a profit for himself which might well exceed the compensation payable to the plaintiffs (see paras 49–50).

(5) The court was of the view that a reasonable prudent purchaser in the sixth defendant's (Maybank) position would investigate as to what, why and how the plaintiffs had alleged there was fraud. Surely, Maybank ought to take precautions to find out the truth of the matter before deciding to grant a loan to the second defendant. If Maybank conducted an investigation, it would discover that the documentary evidence relied upon by Maybank to effect the transfer of the properties was tainted with forgeries. Despite having actual knowledge of the dispute of ownership and the allegation of fraud, Maybank treated the caveats as insignificant and had them removed. Maybank then proceeded to grant a loan to the second defendant and created the charges. In the circumstances of this case, the court found that Maybank had not acted reasonably and fairly. Maybank's conduct excluded good faith. Therefore, the learned HCJ had not erred in making a finding that Maybank was not a purchaser in good faith (see para 66).

[Bahasa Malaysia summary

Ketiga-tiga rayuan ini adalah untuk keputusan Mahkamah Tinggi yang membenarkan tuntutan plaintif-plaintiff ('plaintif') bagi kehilangan sewa dua hartanah dan mengenepikan pemindahan dan pendaftaran nama defendan kedua sebagai pemilik berdaftar hartanah tersebut; membatalkan cagaran defendan keenam dan membenarkan ganti rugi kepada plaintif. Pada Mac 2014, plaintif pertama melantik peguam, YKS untuk memindahkan separuh saham suaminya dalam hartanah pertama kepada namanya. Bagi tujuan itu, beliau menyerahkan dokumen hakmilik hartanah pertama kepada YKS. Beliau mendakwa dokumen hakmilik bagi hartanah pertama telah dikembalikan kepadanya oleh defendan pertama. Pada 20 September 2016, plaintif pertama dimaklumkan oleh penyewanya bahawa mereka diganggu oleh defendan kedua dan ejennya yang mendakwa penyewa perlu membuat pembayaran sewa kepada defendan kedua secara langsung atau penyewa perlu mengosongkan hartanah atas alasan defendan kedua adalah pemilik hartanah tersebut. Penyewa juga menerima notis tuntutan daripada peguam defendan kedua.

Plaintif mengarahkan peguamcara mereka untuk melakukan carian tanah persendirian ke atas hartanah berkenaan dan mengetahui pemindahan hartanah itu kepada defendan kedua serta dokumen-dokumen yang dikatakan dilaksanakan antara defendan kedua berhubung penjualan dan pemindahan hartanah tersebut. Plaintif memfailkan tindakan terhadap defendan untuk mengembalikan semula hartanah berkenaan kepada plaintif dan ganti rugi atas kerugian yang dialami mereka. Plaintif menghujahkan bahawa pemindahan dan cagaran itu tidak boleh dilaksanakan tanpa penipuan oleh defendan-defendan. Selain penipuan, plaintif juga mendakwa berlaku kecuaian terhadap defendan ketiga dan pelanggaran tanggungjawab statutori terhadap defendan kelima. Tidak berpuas hati dengan keputusan Mahkamah Tinggi yang membenarkan tuntutan plaintif, plaintif, defendan kedua dan defendan keenam merayu kepada Mahkamah Rayuan. Isu-isu di hadapan mahkamah ini ialah: (a) sama ada dokumen hakmilik tersebut boleh disangkal; (b) sama ada pemindahan hartanah tersebut kepada defendan kedua diperoleh melalui pemalsuan; (c) sama ada penipuan dibuktikan; (d) sama ada ganti rugi sesuai; dan (e) sama ada bank adalah pembeli bona fide.

Diputuskan, menolak tiga rayuan dengan kos:

(1) Mahkamah bersetuju dengan hujahan peguam plaintif bahawa dapatan HMT mengenai pemalsuan adalah dapatan fakta yang disokong oleh keterangan saksi-saksi. Kedua-dua saksi plaintif telah memberi keterangan bahawa mereka tidak melihat atau menandatangani dokumen yang dipertikaikan itu. Keterangan plaintif mengenai pemalsuan disokong oleh keterangan pakar tulisan tangan plaintif, PW6 yang memberi keterangan bahawa tandatangan plaintif pada dokumen yang dipertikaikan itu adalah berbeza. Mahkamah bersetuju dengan hujahan plaintif bahawa kes yang didakwa plaintif tidak terhad kepada penipuan sahaja. Mahkamah mengambil maklum s 340(2)(b) Kanun Tanah Negara ('KTN') merupakan peruntukan khusus yang secara jelas menyatakan pemalsuan dengan sendirinya cukup menyebabkan hakmilik berdaftar boleh disangkal walaupun pemilik atau penerima hartanah tersebut tidak terlibat dengan pemalsuan tersebut. Ianya menjejaskan pembeli seterusnya walaupun tidak mengetahui perbuatan tersebut. Dalam keadaan kes ini, HMT tidak terkhilaf dari segi undang-undang atau fakta dalam penemuan pemalsuan tersebut dan menggunapakai s 340(2)(b) KTN (lihat perenggan 25–27 & 33–34).

(2) Sebagai pemilik sebenar hartanah sebelum kes ini difailkan, plaintif-plaintif memiliki hakmilik asal. Dengan dapatan Mahkamah Tinggi bahawa plaintif tidak menjual hartanah itu, adalah logik untuk mengatakan bahawa plaintif kekal sebagai pemilik sebenar hartanah tersebut. Oleh itu, walaupun defendan kedua dianggap mempunyai hakmilik asal, ianya tidak mengubah hakikat bahawa pemindahan hartanah tersebut tidak pernah berlaku. Undang-undang dalam s

340(2)(b) KTN tidak memihak kepada defendan kedua. Defendan kedua adalah pembeli seterusnya akibat perbuatan pemalsuan dan mempunyai hakmilik yang boleh disangkal menurut s 340(2)(b). Sifat bona fide pembeli seterusnya ini tidak boleh mencabar peruntukan tersebut. Oleh itu, HMT tidak terkhilaf dalam memutuskan bahawa hakmilik defendan kedua boleh disangkal (lihat perenggan 37–38).

(3) Plaintif tidak mempunyai pengetahuan dan tidak berurusan dengan defendan kedua hingga kelima. Adalah mustahil bagi plaintif untuk mengemukakan bukti bagi penipuan terhadap defendan kedua hingga kelima. Plaintif hanya boleh memberi keterangan mengenai dokumen yang tidak didedahkan itu, iaitu tandatangan mereka telah dipalsukan. Bagi gantirugi kecuaian yang dituntut terhadap defendan ketiga, walaupun HMT mendapati defendan ketiga adalah cuai, tiada kewajipan berhati-hati kepada plaintif kerana tiada hubungan peguamcara-anakguam antara defendan ketiga dan plaintif. Mahkamah mendapati tiada alasan kukuh untuk mengganggu dapatan fakta yang dibuat oleh HMT terpelajar (lihat perenggan 48).

(4) Dengan tiada sebarang penjelasan daripada HMT tentang mengapa HMT hanya membenarkan jumlah RM288,000 dan RM161,000 bagi hartanah masing-masing, mahkamah ini tidak berada dalam kedudukan untuk mengatakan gantirugi tersebut adalah tidak mencukupi. Mengenai tuntutan plaintif bagi ganti rugi teladan, mahkamah bersetuju dengan HMT bahawa ini bukan kes yang sesuai untuk memberikan ganti rugi teladan kerana tiada bukti jelas mengenai kelakuan siapa dalam kalangan defendan-defendan yang boleh dikira untuk keuntungan dirinya sendiri untuk pampasan tersebut perlu dibayar kepada plaintif (lihat perenggan 49–50).

(5) Mahkamah ini berpendapat bahawa pembeli yang teliti dan munasabah seperti defendan keenam (Maybank) akan menyiasat apa, mengapa dan bagaimana plaintif mendakwa berlakunya penipuan. Jelasnya, Maybank perlu mengambil langkah berjaga-jaga bagi mengetahui kebenaran perkara itu sebelum memutuskan untuk memberikan pinjaman kepada defendan kedua. Sekiranya Maybank menjalankan siasatan, Maybank semestinya mengetahui dokumen-dokumen tersebut adalah palsu. Walaupun mempunyai pengetahuan sebenar mengenai pertikaian pemilikan dan dakwaan penipuan, Maybank menganggap kaveat-kaveat itu sebagai tidak penting dan membatalkan kaveat-kaveat tersebut. Maybank kemudiannya memberi pinjaman kepada defendan kedua dan memasukkan cagaran. Dalam keadaan kes ini, mahkamah mendapati Maybank tidak bertindak secara munasabah dan adil. Tindakan Maybank tidak berniat baik. Oleh itu, HMT tidak salah dalam membuat dapatan bahawa Maybank bukan pembeli yang berniat baik (lihat perenggan 66).]

Cases referred to

Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136, CA (refd)
Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768, FC (refd)
Rabiah bt Lip & Ors v Bukit Lenang Development Sdn Bhd and other appeals [2008] 5 MLJ 128, CA (distd)
Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188, FC (refd)
T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd [2018] 5 MLJ 711, FC (refd)

Legislation referred to

National Land Code s 340(2)(b), (3), Forms 14A, 19B

Appeal from: *Yap Piat Eng @ Yap Lien Eng & Anor v Yap Kok Sheng & Ors* [2020] MLJU 57 (High Court, Kuala Lumpur)

Wong Mun Hoe (Long Chay Jo and Noelle Au Yong with him) (Munhoe & Mar) in Civil Appeal No W-01(NCVC)(W)-144–03 of 2020 for the appellant.
R Rajasurian (Vasudevan Appu, Ramesh Lachmanan and Mohd Irfan bin Mohd Asrad with him) (Vasudevan A & Rodwan Chambers) in Civil Appeal No W-01(NCVC)(W)-104–02 of 2020 for the appellant.
Shanti Mogan (Hee Hui Ting with her) (Shearn Delamore & Co) in Civil Appeal No W-01(NCVC)(W)-145–03 of 2020 for the appellant.
Leong Wai Hong (Witter Yee and Cedric Chan Yew with him) (Skrine) in Civil Appeal No W-01(NCVC)(W)-144–03 of 2020 for the third and fourth respondents.
Nurimawatie bt Daud (Maizatul Munirah bt Abdul Rahman and Amirah Haziwah bt Zulkifir with her) in Civil Appeal No W-01(NCVC)(W)-144–03 of 2020 (Selangor State Legal Advisor's Office) for the fifth respondent.

Hadhariah Syed Ismail JCA (delivering judgment of the court):

INTRODUCTION

[1] The subject matter of dispute in these three appeals involve competing claims between the innocent proprietors of the lands and the purported purchaser over the following two properties:

(a) a land held under HS(D) 33355 PT 21039 Mukim Cheras, Selangor together with a 3 % storey building erected thereon bearing the address No 41, Jalan SL 1/4 , Bandar Sg Long, 43200 Cheras, Selangor (first property); and

A (b) a land held under HS(D) 33356 Mukim Cheras, Selangor together with a 3 % storey building erected thereon bearing the address No 39, Jalan SL 1/4, Bandar Sg Long, 43200 Cheras, Selangor (second property).

('the properties').

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[2] Yap Piat Eng @ Yap Lien Eng (the first plaintiff) was the registered proprietor of the first property since 1995. The second plaintiff, Hoyen Enterprise Sdn Bhd was the registered proprietor of the second property since 1996.

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[3] The second plaintiff is a company in which the first plaintiff and her husband, one Chong Wai Onn are the directors and shareholders. Chong Wai Onn owns 95% of the shares in the second plaintiff.

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[4] The properties are adjacent shop lot and are occupied by tenants.

[5] Without the plaintiffs' knowledge and consent, the properties were transferred and registered into Wong Ing Tong's name (the second defendant).

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[6] Thereafter, the second defendant charged the properties to Malayan Banking Bhd (the sixth defendant).

[7] The plaintiffs claim that they did not sell the properties to the second F defendant. They brought this action to set aside the transfer of the properties to the second defendant and to cancel the charges in favour of the sixth defendant.

[8] On 31 December 2019, the High Court allowed the plaintiffs' claim. The court set aside the transfer and registration of the second defendant's name G as the registered proprietor of the properties; cancelled the charges in favour of the sixth defendant and awarded damages to the plaintiffs.

[9] Dissatisfied with the High Court's decision, the plaintiffs (Appeal H No 144), the second defendant (Appeal No 104) and the sixth defendant (Appeal 145) appealed to this court.

[10] We heard the three appeals together on 1 October 2021 and adjourned for decision to 9 November 2021. On 9 November 2021, we unanimously I dismissed all three appeals with no order as to costs.

[11] This is our judgment. In this judgment, we will refer the parties as they were in the High Court.

BACKGROUND FACT

[12] Sometime in March 2014, the first plaintiff (Madam Yap) appointed one Yap Kok Sheng (YKS) to transfer her husband's half share in the first property to her name. YKS is a lawyer practising in the legal firm of MIS Sheng Lee Law Office (the first defendant). For that purpose, Madam Yap handed the issue document of title for the first property to YKS. Madam Yap claims the issue document of title for the first property was returned to her by the first defendant.

[13] On 20 September 2016, Madam Yap was informed by her tenants that they were disturbed by the second defendant and/or his agent who claimed that the tenants had to make payments of rental to the second defendant directly or the tenants would have to vacate the properties on the basis the second defendant was the owner of the properties. The tenants also received a notice of demand from the second defendant's lawyer, M/S Michael Chen & Co.

[14] Upon hearing this, the plaintiffs instructed their new solicitors, M/S Norendra & Yap to conduct a private land searches on the properties. It was only on or about 29 September 2016 that the plaintiffs discovered for the first time about the transfer of the properties to the second defendant as well as the documents purportedly executed between the plaintiffs and the second defendant in relation to the sale and transfer of the properties to the second defendant.

[15] Amongst the documents purportedly executed between the plaintiffs and the second defendant are the sale and purchase agreement dated 30 March 2016 for the respective property; powers of attorney dated 1 April 2016 and Form 14A dated 18 July 2016 for the respective property; (hereinafter referred to as 'the disputed documents').

[16] The disputed documents revealed the following facts:

(a) that the first property was transferred to the second defendant on 2 September 2016;

(b) that the second property was transferred to the second defendant on 8 August 2016;

(c) that in the sale and purchase transaction of the properties, the solicitors purportedly representing the plaintiffs were the first defendant (YKS) and the solicitors representing the second defendant was the third defendant.

(d) that the purported purchase price for the first and second property were RM1.5m and RM850,000 respectively; and

(e) that the second defendant had purportedly paid the full purchase price of the properties to the first defendant.

[17] Thereafter, the plaintiffs lodged a private caveats on the properties on 4 October 2016 (the first caveat). The first caveat were withdrawn by the second defendant who purportedly acted under the power of attorney granted to him for the properties.

[18] The removal of the first caveat facilitates the entry of charge by the second defendant to the sixth defendant on the respective property on 25 November 2016.

[19] The second defendant also intended to sell the properties to one Cheah Teow Meng (the seventh defendant) vide an agreement to sell dated 11 November 2016. A private caveat was entered by the seventh defendant on the properties on 8 December 2016, but the sales did not go through.

[20] Having sighted the disputed documents, the plaintiffs maintain their position that:

(a) they hold the original Issue Document of Title for the respective property;

(b) they did not appoint nor instructed YKS to sell the properties;

(c) they had never instructed YKS or the third defendant to prepare and execute the disputed documents;

(d) they did not sign the disputed documents;

(e) they had never met the second defendant; and

(f) they did not receive any payment from the second defendant directly or otherwise.

[21] On 14 March 2017, the plaintiffs commenced this action against the defendants to restore the properties back to the plaintiffs and for damages for the losses they had suffered. The plaintiffs alleged that the transfers and the charges could not have been effected without the fraudulent conduct involving the defendants. In addition to fraud, the plaintiffs also alleged negligence against the third defendant and breach of statutory duty against the fifth defendant.

THE HIGH COURT DECISION

[22] Upon considering the facts and the law, the High Court made the following orders:

(a) judgment be entered against the first defendant for a sum of RM228,000 being loss of rental in respect of the first property and a sum of RM161,000 being loss of rental in respect of the second property and costs to the plaintiffs;

(b) in respect of the claim against the second defendant and the sixth defendant:

(i) a declaration that the first plaintiff is the legitimate registered proprietor and beneficial owner of the of the first property;

(ii) a declaration that the second plaintiff is the legitimate registered proprietor and beneficial owner of the second property;

(iii) a declaration that the transfer of the properties to the second defendant are null and void and an order that the transfer be set aside and the second defendant is to be removed as the registered proprietor of the properties;

(iv) a declaration that the charges created in favour of the sixth defendant are null and void and an order that they be set aside and cancelled;

(v) order that the Registrar of Titles do all that is necessary:

(1) to cancel the transfer of the properties to the second defendant,

(2) to cancel the charges created in favour of the sixth defendant,

(3) to issue to the first plaintiff an issue document of title to the first property in the first plaintiff's name as the registered proprietor of the first property,

(4) to issue to the second plaintiff an issue document of title to the second property in the second plaintiff's name as the registered proprietor of the second property, and

(5) to rectify the Register Document of Title accordingly.

(vi) costs in favour of the plaintiffs against the sixth defendant; and

(vii) no order as to costs in respect of the plaintiffs' claim against the second defendant.

(c) he action against the third, fourth and fifth defendants was dismissed with costs against the plaintiffs;

(d) the action against the seventh defendant was dismissed with no order as to costs; and

(e) parties to have liberty to apply.

APPEAL NO 104

[23] In this appeal, the appellant (second defendant) raised two issues as follows:

(a) the learned High Court judge had erred in concluding that the transfer of the properties to the second defendant were obtained by forgery; and

(b) the learned High Court judge had erred in holding the second defendant's titles are defeasible.

[24] On the forgery issue, learned counsel for the second defendant submitted that having found the plaintiffs have failed to prove fraud against the second defendant, the learned High Court judge (HCJ) had erred in making a finding of forgery when forgery was pleaded as part of the fraud. It was submitted that the learned HCJ had failed to consider: (a) that there was no evidence of dishonesty on the part of the second defendant; (b) that the second defendant has paid the full purchase price of the properties; and (c) the transactions were handled by the second defendant's solicitors and the first defendant who represented himself as the plaintiffs' solicitors.

[25] In response, learned counsel for the plaintiffs submitted that the learned HCJ's finding of forgery was a finding of fact which was supported by the evidence of the witnesses.

[26] Upon perusal of the appeal records and the grounds of judgment of the learned HCJ, we agree with learned counsel for the plaintiffs' submission. In this case, both the plaintiffs' witnesses have testified that they have not seen nor signed the disputed documents.

They also said their purported signature on the disputed documents were not their signature and were forged.

[27] We find the plaintiffs' evidence on forgery were supported by the evidence of the plaintiffs' handwriting expert, PW6 who testified that the plaintiffs' purported signature on the disputed documents were from different authorship.

[28] Further evidence in support of forgery came from three other witnesses as follows:

(a) Miss Yeo Kheng Gee (PW3) is the Company Secretary of the second plaintiff. PW3 testified that she did not sign on the certified true copy of the director and member resolutions.

In her testimony, she said the signatures were not her signatures and were forged. She further said the rubber stamp appearing on the purported

resolutions were also forged. A

Her evidence was accepted by the High Court;

(b) Mr Lim Chau Yean (PW4) is an advocate and solicitor practising in Messrs Sheng Lee Law Office (legal firm). He left the legal firm in 2013. He gave evidence that he did not witness the first plaintiff signed the sale and purchase agreement dated 23 April 2015 and the Form 14A in relation thereto. He further said that the signature appearing on those two documents were not his signature and were forged. To protect himself, he lodged a police report. His evidence was accepted by the High Court; and B C

(c) the third defendant, Miss Yu Ai Ting (DW4) is an advocate and solicitor practising in M/S YS Lim & Ng. DW4 was the solicitor who acted for the second defendant in the sale and purchase transactions. DW4 admitted that she had signed as having witnessed or seeing the first plaintiff signed on the Form 14A dated 18 July 2016 as 'instructed by Yap Kok Sheng (YKS)'. In actual fact, she admitted that she did not actually witnessed the first plaintiff sign the said Form 14A. Her admission support the first plaintiff's assertion that she had not seen nor signed the purported Form 14A. DW4's admission was accepted by the High Court. D E

[29] It is pertinent to note that the learned HCJ had also made a finding of fact that none of the defendants' witnesses had testified that they have met the first plaintiff and her husband. Instead, the second defendant and the third defendant deal directly with the first defendant only. F

[30] In light of the above evidence, we agree with the finding of fact made by the learned HCJ at paras [224], [234], [269] and [281] of His Lordship's judgment which states as follows: G

> [224] The testimonies of PW4, the third defendant and PW3 were, in my view, indicative of some impropriety that was afoot relating to the dealings with the properties.
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> [234] Clearly PW6's opinion cannot per se be conclusive. However, even if his opinion is unreliable by reason of the lack of sufficient specimen signatures to compare with, this does not mean it was therefore proven that the first plaintiff and Chong Wai Onn did sign the disputed documents. H
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> [269] On a balance of probabilities, I find that neither the first plaintiff or Chong Wai Onn signed on any of the disputed documents relating to the sate and transfer of the properties, including the powers of attorney. I
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> [281] Having found that the plaintiffs did not sign any of the documents relating to the sale and transfer of their respective properties to the second defendant, it would

follow that the registration of the second defendant as proprietor of the properties was obtained by forgery, or in any event, by means of insufficient or void instruments.

[31] At the High Court, the second defendant had contended that the plaintiffs' pleaded case was fraud. Therefore, it was submitted that the plaintiffs cannot rely on s 340(2)(b) of the National Land Code ('the NLC') which provides as follows:

> 340(2) The title or interest of any such person or body shall not be indefeasible —
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> (a) in any case of fraud or misrepresentation to which the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[32] In response, learned counsel for the plaintiffs argued that the entire pleaded case of the plaintiffs rested on the contention that they never executed any of the documents relating to the sale and transfer of the properties. Having proven their signatures were forgeries, as a matter of law, the plaintiffs can invoke s 340(2)(b) of the NLC to set aside the registration of the second defendant as the registered proprietor of the properties.

[33] We agree with the plaintiffs' contention that the plaintiffs' pleaded case is not limited to fraud only. The second defendant cannot deny that there are many disputed documents purportedly executed between him and the plaintiffs which the plaintiffs say they have not seen nor signed. When forgeries were alleged by the plaintiffs, surely, the dispute cannot be resolved by merely accepting the second defendant's contention that he was a bona fide purchaser who has paid the full purchase price. To accede to the second defendant's argument that in the absence of fraud or dishonesty on his part, the plaintiffs' claim must fail would cause serious miscarriage of justice to the plaintiffs. Therefore, in fairness to all parties, the learned HCJ had to consider the whole circumstances of the case.

[34] Our courts had recognised that s 340(2)(b) of the NLC is a specific provision which expressly stated forgery by itself is suffices in making a registered title defeasible even though the proprietor or the transferee is not a party to the forgery. It affects the immediate purchaser even if he was an innocent purchaser for value (*Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188 at p 200). In the circumstances of this case, our view is the learned HCJ had not erred in law or in fact in his finding of forgery and in

invoking s 340(2)(b) of the NLC.

[35] We now turn to the second issue. Learned counsel for the defendant submitted that the learned HCJ had erred in holding the second defendant's title to the properties were defeasible. It is submitted that the learned HCJ had failed to consider: (a) there was no evidence of a replacement title for the properties had ever been issued to the second defendant; and (b) the fact that the registration of the transfer of the properties had been approved by the land office show the issue document of title submitted were genuine. In simple word, the second defendant say he obtained an indefeasible title because the transfer was effected with a genuine issue document of title.

[36] At the High Court, both the plaintiffs and the second defendant claimed they each had in their possession a genuine issue document of title for the properties. The plaintiffs have produced their titles, marked as exhs P11 and P12 respectively. With regard to the issue of the genuineness of the titles, this is what the learned HCJ had to say:

> [249] In my view, it was never established as a fact that the issue documents of title in respect of presented in evidence at the trial by the the properties plaintiffs were other than what the plaintiffs were originally issued with by the land office in respect of their respective properties.
>
> [250] More importantly and more relevant to the case at hand, was whether the plaintiffs actually entered into any agreement to sell and transfer the properties to the second defendant and not whether the issue documents of title they have in their possession were genuine or authentic.
>
> [251] It may be that the issue documents of title in their possession were may have been part of a fraud fake copies of the genuine given fake issue documents ones. They of title as
>
> [252] If the plaintiffs never contracted to sell and transfer the properties to the second defendant, and the plaintiffs were at all material times prior to the transfer the true registered owners of the properties, the second defendant would have no legal right to the properties being registered in his name or to deal with them.

[37] We fully agree with the approach adopted by the learned HCJ. As the true owners of the properties prior to this case, surely the plaintiffs had in their possession the original titles. With the High Court's finding that the plaintiffs did not sell the properties, it is only logical to say the plaintiffs remain the true owners of the properties. Therefore, even assuming it 1s true that the second defendant had a genuine titles, it does not change the fact that the transfer of the properties never takes place.

[38] Furthermore, the law in s 340(2)(b) of the NLC does not operate in favour of the second defendant. It is without doubt that the second defendant is an immediate purchaser of a title tainted with forgery acquires a title that is

not indefeasible under s 340(2)(b). The bona fide of the immediate purchaser is not a shield of indefeasibility. The title obtained by the immediate purchaser is liable to be set aside once the vitiating elements under s 340(2)(b) is proven; see Federal Court case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768. Therefore, the learned HCJ did not err in holding the second defendant's titles are defeasible.

[39] For the aforesaid reasons, we find there is no appealable error to warrant appellate intervention. The decision of the High Court is not plainly wrong. Therefore, we dismissed the appeal.

APPEAL NO 144

[40] The appeal by the plaintiffs is against the finding of the learned HCJ that:

(a) the plaintiffs have failed to prove fraud against the second to fifth defendants;

(b) the third and fourth defendants owed no duty of care to the plaintiffs; and

(c) the plaintiffs have failed to prove fraud, negligence and breach of statutory duty against the fifth defendant.

[41] The issues raised by the plaintiffs are as follows:

(a) the learned HCJ had failed to consider that the entire fraudulent transactions could not have happened if not because of the fraud orchestrated by the second defendant to the fifth defendant;

(b) the learned HCJ had failed to hold the third and fourth defendant were negligent;had assumed a duty of care to the plaintiffs and had breached the duty of care which amount to fraud;

(c) the learned HCJ only awarded RM161,000 against the first defendant as the loss of rental of the second property, less than RM212,820 claimed by plaintiffs; and

(d) the learned HCJ had failed to award exemplary damages to the plaintiffs.

[42] The particulars of fraud alleged against the second defendant is pleaded in paras 48 and 48A of the amended statement of claim. Among them were that the second defendant was involved 1n procuring or caused the issue of forged copies of the issue documents of title in respect of the properties, instructing or causing to be prepared the disputed documents relating to the sale and transfer of the properties, withdrawing the plaintiffs' caveats without the knowledge of

the plaintiffs and entering into a sham sale and purchase agreement with the seventh defendant. The learned HCJ refers these allegations of fraud as 'a blunderbuss of allegations'.

[43] With regard to the plaintiffs' allegations of fraud against the second defendant, the learned HCJ found there was no evidence of any fraud against the second defendant. His Lordship also found there was no evidence that the second defendant had conspired with anyone to fraudulently transferred the properties to himself. Instead the learned HCJ ruled that the second defendant's purchase of the properties were done through his lawyers, the third and fourth defendant.

[44] The particulars of fraud alleged against the third and fourth defendant is pleaded in para 49 of the amended statement of claim. Among them were the third and fourth defendant were involved in executing or caused to be executed the sale and purchase agreements, Powers of Attorney and Form 14A; withdrawal of the plaintiffs' caveat without the plaintiffs' knowledge and failure to investigate the authenticity of the witness of the first plaintiff's signature by Lim Chau Yean (PW4) from Sheng Lee Law Office where (PW4) ceased practising in Sheng Lee Law Office since 2013.

[45] The learned HCJ found there was no evidence led by the plaintiffs of any actual fraud on the part of the third and fourth defendants. In fact, when the first plaintiff was cross-examined by the learned counsel for the third and fourth defendants as to whether she has any evidence to support the allegations of fraud against the third and fourth defendants, the first plaintiff says she does not know the third and fourth defendants and she had no evidence against them.

[46] As against the fifth defendant, the plaintiffs' allegation of fraud, among others, are failure to ensure that only one original issue document of title exist; to ensure that the system of registration or the records were correct and up to date; accepting the Forms 14A and the forged issue documents of title for the purposes of the transfers when they were not valid and failure to conduct an investigation. Against these allegations, the learned HCJ makes the following finding of facts:

(a) the fifth defendant had found the documents presented for the transfer of titles to the properties in conformity;

(b) there was no evidence of any fault or failure on the part of the fifth defendant; and

(c) none of the allegations of fraud, negligence or breach of statutory duty were made out against the fifth defendant.

A **[47]** In relation to the plaintiffs' claim in negligence against the third and fourth defendants, the learned HCJ ruled that the transactions in this case were done between the solicitors for the vendors and solicitors for the purchaser. That there was no direct dealing between the third and fourth defendant with the plaintiffs. That the whole problem arose as a result of the third defendant's B reliance on the first defendant's representations and not the plaintiffs' reliance on the third defendant's representation if ever made. In the circumstances of the case, the learned HCJ held that the third and fourth defendants owed no duty of care to the plaintiffs.

C

[48] We agree with the finding of facts made by the learned HCJ on the issue of fraud and negligence against the second to fifth defendant. The truth is the plaintiffs do not know and had no dealing with the second to fifth defendant. It would be impossible for the plaintiffs to adduce evidence to prove fraud D against the second to fifth defendant. The plaintiffs can only testify on the impugned documents, namely their signatures were forged. As for the negligence alleged against the third defendant, although the learned HCJ found the third defendant was reckless, no duty of care is owed to the plaintiffs as there was no solicitor-client relationship between the third defendant and E the plaintiffs. We see no good reason to disturb the finding of fact made by the learned HCJ.

[49] In relation to the award of loss of rental in the sum of RM288,000 for the first property and RM161,000 for the second property, the plaintiffs' F complaint is the learned HCJ did not grant any award for the loss suffered by the plaintiffs up until the properties were recovered from the second defendant. In the absence of any explanation by the learned HCJ as to why His Lordship only allow the sums of RM288,000 and RM161,000 for the respective property, we are not in in a position to say the award is erroneous.

G

[50] With regard to the plaintiffs' claim for exemplary damages, we agree with the learned HCJ that this is not a suitable case to award exemplary damages as there was no clear evidence as to whose conduct amongst the defendants that can be calculated to make a profit for himself which may well H exceed the compensation payable to the plaintiffs.

[51] For the aforesaid reasons, we find there is no merit in this appeal. The appeal is, therefore dismissed. The decision of the High Court is affirmed.

I APPEAL NO 145

[52] The appeal by the sixth defendant (Maybank) is against the decision of the High Court which held that Maybank was not a purchaser in good faith within the meaning of the proviso in s 340(3) of the NLC by reason of it having

notice of the caveats and consequently, the charges created in favour of Maybank were void and set aside.

[53] By reason of the titles acquired by the second defendant were defeasible under s 340(2)(b), the charges created in favour of Maybank were also defeasible unless Maybank can prove it had acquired its interest in the properties ie the charges, in good faith and for valuable consideration under the proviso of s 340(3) which reads as follows:

> 340(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested;
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[54] The word 'good faith' has no exhaustive meaning. Generally, good faith is understood to mean honesty or sincerity of intention. The common features to look for in determining a purchaser of good faith are as follows:

(a) good faith does not simply mean absence of fraud, deceit or dishonesty. It also requires acting honestly, reasonably and fairly (*T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd* [2018] 5 MLJ 711);

(b) knowledge of a dispute as to the ownership of property and knowledge of fraud allegation vitiate good faith (*T Sivam*'s case); and

(c) elements of carelessness and negligence negate good faith (*Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136.

[55] In this case, the plaintiffs have lodged a caveat on 4 October 2016. In Form 19B for the first property, the first plaintiff states, inter alia, as follows:

> (i) Pada masa yang matan, saya merupakan pemilik berdaftar dan benefisial bagi tanah yang dipegang di bawah HS (D) 33355 PT 1039 Mukim Cheras Daerah Ulu Langat, Selangor dan semua bangunan yang didirikan di atas tanah tersebut (harta tersebut).
>
> ...
>
> (viii) Saya amat terkejut mendapati bahawa harta tersebut telah secara penipuan telah dipindahmilik kepada Wong Ing Tong pada 2.9.2016.

A (ix) Saya telah mengarahkan peguam saya untuk memulakan satu tindakan guaman untuk membalalkan pindahmilik secara fraud tersebut.

(x) Saya masih memegang surat hakmilik asal harta tersebut. Oleh yang demikian, saya ingin memasukkan suatu kaveat ke alas hartanah tersebut untuk mengekalkan hak saya kepada hartanah tersebut.

B

[56] In respect of the second property and the second plaintiff's caveat on 4 October 2016, the first plaintiff and her husband, Chong Wai Onn as directors of Heyen Enterprise Sdn Bhd, states in Form 19B, inter alia, as follows:

C

(i) Pada masa yang matan, Syarikat tersebut merupakan pemilik berdaftar dan benefisial hartanah yang dipegang di bawah HS(D) 33356 PT 21040 Mukim Cheras, Daerah Ulu Langat, Selangor dan semua bangunan yang didirikan di alas tanah tersebut (harta tersebut).

D ...

(viii) Saya amat terkejut mendapati bahawa harta tersebut telah secara penipuan telah dipindahmilik kepada Wong Ing Tong pada 8.8.2016.

(ix) Saya telah mengarahkan peguam Syarikat untuk memulakan satu tindakan guaman untuk membatalkan pindahmilik secara fraud tersebut.

E (x) Syarikat tersebut masih memegang surat hakmilik asal harta tersebut.

[57] Maybank's lawyer for the loan documents, one Chong Tian Hock (DW7) testified that he knew about the plaintiffs' 4 October 2016 caveats. He admitted he has read the plaintiffs' Form 19B. He, therefore, knew about the allegation of fraud and the rival claim. However, he said he was not interested to know the details of the caveats or why the caveats were entered. He, nevertheless informed Maybank about the existence of the caveats on 28 November 2016.

F

G

[58] It is trite law that the knowledge of fraud and rival claim on the part of the bank's solicitor was the knowledge of the bank; see *T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd* [2018] 5 MLJ 711.

H

[59] Based on *T Sivam*'s case, the learned HCJ ruled that Maybank had actual knowledge of the plaintiffs caveats and the alleged fraud upon being informed by DW7. Therefore, Maybank knew of the rival claim and the alleged fraud. This fact is not denied by Maybank.

I

[60] Relying on the documentary evidence which show Wong Ing Tong was the registered proprietor of the properties and the powers of attorney were validly registered, DW7 enquired with Wong Ing Tong about the caveats. Wong Ing Tong told DW7 that he was aware of the caveats and that he can use

the Powers of Attorney to remove the caveats. The caveats removal form was prepared by Wong Ing Tong's lawyer, the third defendant.

[61] The plaintiffs' caveats were removed by the land office without giving any notice to the plaintiffs.

[62] In concluding Maybank had not acted in good faith, the learned HCJ takes cognizance of the following facts:

(a) DW7 did not make enquiries with the plaintiffs to seek their views;

(b) dhe requirement to give notice to the caveator was bypassed by using the powers of attorney when it would be reasonable to make enquiries to ascertain that the powers of attorney was genuinely executed; and

(c) Maybank was not concerned with the issue of fraud, why the caveats existed and how they were removed. It appears that Maybank is only concerned with getting the caveats removed.

[63] Before us, learned counsel for Maybank submitted that the caveats dated 4 October 2016 are merely assertions of an interest in a property by the caveator. It is submitted that a caveat is not a notice of fraud, but merely a notice of an adverse claim that may be asserted by anyone, bona fides or otherwise. Maybank relies on the Court of Appeal case of *Rabiah bt Lip & Ors v Bukit Lenang Development Sdn Bhd and other appeals* [2008] 5 MLJ 128.

[64] In *Rabiah*'s case, the appellants who are squatters in six plots of land (out of 407 plots purchased by the respondent developer) had lodged a private caveat in respect of the six plots, claiming each of them had paid RM3,000 to the land owner to purchase their respective plot The High Court found there was no concluded agreement for the purchase of the six plots as contended by the appellants. The Court of Appeal affirmed the High Court's decision and ruled that the caveat entered by the appellants were an after thought. We find *Rabiah*'s case does not apply because the facts and issue in that case is totally different from the present case.

[65] It was submitted that Maybank has taken sufficient reasonable steps to enquire about the caveats and Wong Ing Tong's ownership of the properties. Therefore, it was submitted that the learned HCJ placed an erroneous burden on Maybank to meet the good faith requirement.

[66] We disagree with the learned counsel for Maybank's submission. In our view, a reasonable prudent purchaser in Maybank's position would investigate as to what, why and how the plaintiffs had alleged there was fraud. Surely, Maybank ought to take precautions to find out the truth of the matter before

deciding to grant a loan to the the second defendant. If Maybank conduct an investigation, it will discover that the documentary evidence relied upon by Maybank to effect the transfer of the properties to Wong Ing Tong were tainted with forgeries. Despite having actual knowledge of the dispute of ownership and the allegation of fraud, Maybank treat the caveats as insignificant and had them removed. Maybank then proceed to grant a loan to the second defendant and create the charges. In the circumstances of this case, we find Maybank had not acted reasonably and fairly. Our view is, Maybank's conduct exclude good faith. Therefore, we find the learned HCJ had not erred in making a finding that Maybank was not a purchaser in good faith.

[67] For the aforesaid reasons, we find no merit in the appeal. We, therefore dismissed the appeal.

[68] In view of the circumstances of this case, we make no order as to costs for all three appeals.

Appeals dismissed with costs.

Reported by Muhamad Azham Marwan